



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: A320/2017

In the application between:

ZAKARIA MAKHUBELA

Appellant

and

THE STATE

Respondent

CORAM: NM MBHELE, J *et* S BENADE, AJ

JUDGMENT BY: BENADE, AJ

DELIVERED ON: 09 MAY 2018

JUDGMENT

- [1] The essential function of an appeal court is to determine whether court below came to a correct conclusion. (Quartermark Investments v Mkhwanazi 2014 (3) SA 96 SCA at 103B and Sarrahwitz v Maritz 2015 (4) SA 4 SA 491 CC at 505I).
- [2] The issues for determination in this case are firstly, whether the accused was correctly found guilty of rape, and secondly, if not so, whether the accused should be found guilty in terms of section 261(1)(g) of the Criminal Procedure Act, 1977 of the competent verdict of statutory rape of a child contained in section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007).
- [3] The accused was charged with the crime of contravening the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 it being alleged by the state that on or about the night of the 3rd to the 4th April 2016 and at Thabong in the district of Welkom the said appellant did unlawfully and intentionally rape the complainant. The aforementioned date was the Saturday night/Sunday morning and the accused was arrested the Tuesday night at his home in Thabong. His first appearance was on 22 June 2016 and he remained in custody until his trial started in the regional court of Welkom on 9 March 2017. He pleaded not guilty but after the testimony of the complainant (who was born on [...] 2001 and was 16 years old at the trial) and her mother (for the State) as well as the accused for the defence, was heard, he was found guilty on 3 May 2017 as charged. He was sentenced on 3 May 2017 in terms

of section 276(1)(b) of the Criminal Procedure Act, 1977, to 10 years imprisonment.

- [4] At the date of the appeal the accused has been incarcerated for some 20 months.
- [5] The accused was 23 years old at the time of the trial.
- [6] On the abovementioned first issue for determination the main question is whether there is, on the complainant's version, any reasonable doubt about the guilt of the appellant. What makes the case difficult is the defence of consensual sex. The complainant and the appellant are in agreement that sexual intercourse occurred between them at the appellant's dwelling on the night of 3/4 April 2016 (with two other persons namely the complainant's friend M. and her boyfriend P. sleeping in the same room) but the complainant alleges that the sexual intercourse was without her consent and the appellant contending that it was consensual sex.
- [7] The salient facts, for current purposes (as based on the complainants own version) are the following: The complainant, who was still in grade 9 at school, with the concurrence of her mother (with whom she normally stays) went to her father's home for the Easter of 2016 (to be back in time for the school opening). When she arrived at her father's home, he was not around, so (on her own version) she took it upon herself to spend the rest of the Easter holidays at other people. That was at the house of the sister of one of her close friends, M.. She went there (instead of

to her father's house) without consulting her father or mother about it. She stayed there for a week and a few days.

- [8] According to the complainant, she stayed at M.'s sister's house because she wanted her boyfriend (one S.) to have access in visiting her. M.'s sister worked night shift. On the evening of Sunday 3 April 2016, the complainant and M. were initially at Aida's Tavern. They arrived there with their own drinks already at hand. M. had her boyfriend P. with her, so they were three. At Aida's Tavern they met ("found") the accused. P. was the one that bought the drinks at the tavern. The four of them then proceeded to Puleng's Tavern. When Puleng's Tavern was about to be closed around past three in the morning of the 4th, they went to the appellant's home to fetch a jersey, before they would have gone back to the place they stayed at M.'s sister's home. Appellant's house was a shack.
- [9] According to the complainant the accused offered them bread. Thereafter her friend M. lay down on a mattress. At that stage the accused also wanted her to get inside the blankets but she refused. She then exited the shack and ran away to the house of M.'s sister. At a certain corner, the accused came from the front. He then forced her back to the shack.
- [10] When the complainant and the appellant reached the shack they found M. and P. sleeping on the floor of the shack. The appellant then raped her (using a condom) on the bed in the shack.

- [11] Around 05:00 o'clock the Sunday morning 4 April 2016, she left (leaving the appellant, P. and her friend M. at the shack) and went to M.'s sister's house. When she arrived there she bathed and went to sleep. M.'s sister did ask her (on complainant's arrival) about arriving home alone and where M. was. She then lied to the sister that she left M. at Puleng's place. M. arrived there at half past 10 the Sunday morning of the 4 April 2016. According to the complainant she told P. during the Sunday morning about the rape "but he took it as a joke".
- [12] The complainant was supposed to go back to her mother (coming from her father's place) by Monday night to be in time for school which started the Tuesday. Yet she went home to her mother on Tuesday afternoon around five o'clock, resulting in her missing school on Tuesday as Monday was a holiday.
- [13] When the complainant arrived at her mother's place she initially did not tell her of the rape. Her mother was furious and beat her for 30 minutes (apparently for being late back for school). Then the complainant told her of the rape, where after they called the police.
- [14] The mother testified and corroborated the beating, yet claiming that a cousin did the beating. According to the mother she came back after the schools had already opened. Upon arrival the complainant did not upfront tell her mother of the rape but initially went inside her bedroom. Then after she spoke to her, and the cousin beat her, did she tell of the rape.

[15] The accused testified and in broad terms, confirmed the version of the complainant, in the sense that the four of them initially were at taverns where after they went to his house. At his house he and his girlfriend (the complainant) had sexual intercourse while his friend P. and his girlfriend (M.) were in the same shack. On numerous aspects there were differences, like his version that P., M. and the complainant left his home the following morning at 09:00AM. The sexual intercourse according to him occurred the Saturday/Sunday morning, they left the Sunday morning and he was arrested the Tuesday evening around 24h00.

[16] His central version as to why she would accuse him of rape was in the following words:

“According to me by the look of things for her to open the rape charge against me she did not have a valid reason to tell her parent where was she all along.”

[17] His basic version was:

“I did not rape her I slept with her.”

[18] It would not be worthwhile or helpful to set out and tabulate the differences in version between the complainant and her mother, or between the complainant and the appellant, or between the mother and the appellant. They are numerous. The basic story is the same (the complainant not staying with her father, having been at a tavern with P. and M., having met the accused, they going to his house, they leaving the Sunday morning (although when whom left are in contention), that she went to her mother either the Monday

evening or the Tuesday evening and there at her mother only telling the mother of the rape after a beating.)

[19] I prefer under these circumstances of a basic ring of truth amongst them of the salient story, but acute differences on pertinent parts, to adjudicate the appeal on the basis of the complainant's version. In so doing the complainant is given the inside track. I thus decide whether the case was proven beyond reasonable doubt upon the complainant's version. (See *S vs Ipeleng* 1993(2) SACR 185 T at 190 F) without it being contaminated by competing versions or differing versions from her mother or the accused.

[20] To my judgment the following aspects cast doubt on the state's case and cause the accused's version (of consensual intercourse) to be reasonable possibly true (*S v Van Der Meyden* 1999 (2) SA 79 WLD at 82C):

1. Her standing, as a mere Grade 9 schoolgirl, is tainted as she was supposed to stay with her father but she took it upon her (without any parental permission) to stay for more than a week at her friends' sister's home – in other words where her parents did not know where she was. This she did to get easier access to her boyfriend S..
2. When she initially tried to flee from the shack and the accused accosted her from the front she did not scream or call for help when he allegedly forced her back to the shack.
3. When the rape took place M. (one of her best friends) and her boyfriend P. was in the very same shack on the floor. Why could they not help her? On her version her best friend M. would have ignored her pleas or was simply asleep.

4. After she left the shack and walked to M.'s sister's home that following morning (the Monday morning) she did not tell that sister about the rape. In fact, on her version the sister enquired from her where M. is and she told her where she was, but never told her of the rape. Her only excuse therefore was "because we are not related". In other words, in the presence of an older person, and actually a woman, and furthermore the sister of her best friend, she still did not tell about the rape.
5. Although her father's house apparently was nearby, she also did not go to him. She also told or complained to no neighbours and also did not go on her own to the police. In effect then, a whole day went past without her complaining to anybody (except for having told P.).
6. She arrived home at her mother's place late on Tuesday. Later than she should have and also late for school. She thus was in trouble from the start coming back home.
7. When she arrived at her own mother's home she did not initially tell her mother of the rape. Only after she was beaten for some 30 minutes did she then tell her mother. Her mother does not deny the beating, but claims that the beating was done by her cousin. That she thus was beaten, and thereafter told the rape version, is corroborated.
8. Her mother, on her part and in her testimony, was also not honest about the beating of the complainant. It was only in cross-examination that she confessed to the beating and then said that it was actually the cousin. She was evasive as to how long the beating lasted.

9. The state did not call M.. In other words, the complainant's best friend whom one would have expected would carry the interest of the complainant at heart and could have corroborated her, was simply not called. And furthermore, M. was one of the persons who was in the shack and apparently very nearby when this rape would have taken place.
10. Even M.'s boyfriend, P. who was also in the shack when the alleged rape took place, was not called. He is also the person of so-called "first report" as the complainant testified that she told him the following morning about the rape but he did not take her seriously.

[21] As debated during argument with Mr Botha, the question is when does reasonable doubt come to the fore? As Mr Botha argued the test is not beyond all doubt. According to the correct test there may not exist "reasonable doubt" about the state's case. The proof afforded must be beyond reasonable doubt, which means beyond all reasonable doubts. When the above disconcerting aspects of the complainants version are considered and weighed, there exist in my judgment reasonable doubt about the state's case.

[22] In the light of the above the second of the two main aspects for consideration needs to be dealt with. According to section 261(1)(g) of the Criminal Procedure Act, 1977 a guilty verdict under section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 is a competent verdict when a charge of rape is not proved. The complainant was still a child within the definition of the aforementioned act when the sexual intercourse took place. The problem though is that on the record

there is no indication that the appellant knew that the complainant was under sixteen years of age. There is only one passage in the testimony where he was asked as follows:

“Now did you know her age? ... What she told me she said she is nineteen years old or she was nineteen years old.”

- [23] There are no other indications as to the appellant’s state of mind regarding her age. During argument, Mr Botha also indicated that he does not seek such competent verdict to be entered.
- [24] Accordingly, the appeal succeeds and the court *a quo* judgment and verdict is substituted for a verdict of not guilty.

BENADE, AJ

I concur

HM MBHELE, J

On behalf of the Appellant:

Instructed by:

Bloemfontein Justice Centre

BLOEMFONTEIN

On behalf of the Respondent:

Instructed by:

Director of Public Prosecutions

BLOEMFONTEIN